THE BORNEO POST SDN BHD

v.

MARGARET WONG

HIGH COURT SABAH & SARAWAK, KUCHING
DENIS ONG J
[ORIGINATING MOTION NO: KG 4 OF 1994/I]
10 JANUARY 1995

LABOUR LAW: *Industrial Court - Jurisdiction - Dismissal of workman - Workman did not specifically pray for reinstatement - Whether Industrial Court deprived of jurisdiction to hear and determine dispute - Industrial Relations Act 1967 ss. 20(3), 29(d), 30(6) - Industrial Court Rules r. 9(3)(b) - Rules of the High Court 1980 O. 53 r 1(2)*

The respondent was dismissed from her employment by the applicant and the matter came before the Industrial Court for adjudication *vide* Industrial Court Case No. 4/4-336/89 ('the case'). Before the learned Chairman, the applicant took up an objection that the Industrial Court had no jurisdiction to hear and determine the case, as the applicant did not want, but only pretended to want reinstatement in order to maintain her claim for damages. The facts showed that the respondent, in her statement of case, had deliberately omitted to pray for reinstatement, apparently for fear of being humiliated and victimised by her applicant employer. The Industrial Court, while alluding to the suggestion that the respondent did not in fact want reinstatement, ruled nonetheless that it had the jurisdiction to hear and determine the case. Dissatisfied, the applicant applied for leave for *certiorari* to issue to quash the ruling.

Held:

[1] The Industrial Court had not committed any error of law affecting its jurisdiction in ruling that it had jurisdiction to hear and determine the case. (p 761 h)

[2] On a fair reading of the respondent's statement of case, it is correct to say that the respondent would have liked to be reinstated and would have specifically prayed for it, but if her past experience was any guide, reinstatement would be inappropriate or inexpedient. In other words, she accepted that it is for the court to order or not to order for reinstatement but prayed that the Industrial Court would not make such an order. It is thus misleading to say that the respondent did not want reinstatement. (p 761 c)

[3] In any case, whether or not reinstatement must be expressly prayed for in the statement of case is a matter of procedure. The omission in the statement of case to state it as a specific relief, therefore, does not affect the jurisdiction of the Industrial Court to hear and determine the case on merits. The Industrial Court, as it were, derives its jurisdiction from the order of the Minister made under s. 20(3) of the Industrial Relations Act 1967. (p 761 f)

[Application refused.]

Case(s) referred to:
Assunta Hospital v. Dr A Dutt [1981] 1 MLJ 115 ***(refd)***
Holiday Inn, Kuching v. Lee Chai Siok Elizabeth [1992] 1 CLJ 141; [1992] 2 CLJ (Rep) 521 ***(refd)***
The Borneo Post Sdn Bhd, Kuching v. Margaret Wong Kee Sieng [1994] 1 ILR 120 ***(refd)***

Legislation referred to:
Industrial Court Rules 1967, r. 9(3)(b)
Industrial Relations Act 1967, ss. 20(3), 29(d), 30(6)
Rules of the High Court 1980, O. 53 r. 1(2)

For the applicant - HC Sim; M/s Reddi & Co
For the respondent - HH Cheng; M/s Cheng & Cheng

Reported by WA Sharif

JUDGMENT

Denis Ong J:
By an *ex parte* notice of originating motion dated 18 March 1994 and filed on 28 July 1994, the applicant abovenamed, applies to the court for leave to issue *certiorari* to remove into this court, Industrial Court Award No. 53 of 1994 given on 6 February 1994 in Industrial Court Case No. 4/4-336/89 for the purpose of quashing the said award.

Three grounds upon which the relief sought were contained in the statement dated 19 March 1994 made pursuant to O. 53 r. 1(2) of the Rules of the High Court 1980. An affidavit sworn by Catherine Lau on 18 March 1994 was filed in support of the motion.

At the first hearing on 4 November 1994, I took the view that Margaret Wong Kee Sieng should be cited as the respondent in the motion and directed that a copy of motion be served on her so that she could be heard at the resumed hearing as a party. This direction was complied with. On 31 December 1994, Mr Cheng Hui Hong, learned counsel for Margaret Wong, filed an affidavit of the same date.

At the resumed hearing on 6 January 1995 learned counsel for the applicant Mr HC Sim tendered a written submission which was admitted to from part of the record and marked encl. (19).

Award No. 53 of 1994 is a ruling in writing (exh. CL2) of the Industrial Court on a preliminary point as to the jurisdiction of such court to hear and determine Industrial Court Case No. 4/4-336/89 taken by the "company" (applicant herein) at the outset of the hearing fixed for 28 September 1993. The ruling was a reserved ruling handed down on 6 February 1994 as Award No. 53 of 1994. The present application for leave to issue *certiorari* is thus to quash such ruling and not to quash an award determined by the Industrial Court on the merits. It is a fact that no evidence was adduced yet by the "claimant" (the respondent herein) before the Industrial Court in support of her case.

Although three grounds were given in the statement pursuant to O. 53 r. 1(2), it is apparent that grounds one and three are incidental to ground two which is the main one.

Mr Sim drew attention that prayers (1), (2) and (3) listed under the section "B decision pray for" at p. 5 of the statement of case marked exh. CL1 and the penultimate paragraph under that same section should be read together. So read, he submitted that it is obvious that the claimant does not want reinstatement but pretended to want or be permitted to carry on the fiction that she wants reinstatement in order to maintain a claim for damages. He pointed out that the Industrial Court directed its mind only to the penultimate paragraph but not the prayers expressly asked for and that was where it had erred in law. He cited *Holiday Inn, Kuching v. Lee Chai Siok Elizabeth* [1992] 1 CLJ 141; [1992] 2 CLJ (Rep) 521 and submitted that where the claimant did not want the job back, the Industrial Court would have no more jurisdiction to deal with the reference or matter before it. He further submitted that where the claimant was only interested in damages and not reinstatement, then her remedy was a claim on common law.

Mr. Cheng submitted that although reinstatement was not specifically prayed for, it is included in the 3rd prayer which asks for "any other order the court deems fit and proper in the circumstances". He said the omission is not fatal and even if it was not specifically asked for, under s. 30(6) of the Industrial Relations Act 1967 (Act 177) it was still open to the Industrial Court to order reinstatement or compensation *in lieu* of reinstatement as it deems fit.

In my view, reinstatement in her former employment like specific performance is a specific relief which must be expressly prayed for in the statement of the case if it is desired: see Industrial Court Rules 1967 r. 9(3)(b). That is a point of procedure. It is not one that could be said to be included in

prayer 3 of the statement of the case which is meant for order(s) incidental to prayers (1) and (2). It is a fact that reinstatement is not expressly prayed for in exh. CL1. The question then is whether or not the omission is deliberate. To my mind, it is deliberate and I say this because the paragraphs following immediately after prayer 3 touch on the topic of reinstatement and compensation. The respondent recounted her five years experience in the employment of the applicant, complained of unfair and unhappy treatment at the hands of the management, the victimisation and humiliation she suffered, all of which she felt would make reinstatement inappropriate or inexpedient. She feared that she would be humiliated and victimised again by the management if reinstated and expressed her preference for compensation even though she is gainfully employed with a lower pay in the private sector. On a fair reading of that section, it would be correct to say that the respondent would have liked to be reinstated and would have specifically prayed for it but if her past experience was any guide, reinstatement would be inappropriate or inexpedient. She accepts that it is for the court to order or not to order reinstatement and she prays that in those circumstances the Industrial Court will not make such an order.

In my view, it is misleading, as the Industrial Court stated in its ruling, to say the respondent does not want reinstatement. I think it would be more accurate to say that she wanted reinstatement but that it would be inexpedient in her circumstances for the Industrial Court to order it which accounts for her omission to ask for it.

As I said earlier, whether or not reinstatement must be expressly prayed for in the statement of the case is a point of procedure. The omission in the statement of the case to state it as a specific relief does not affect the jurisdiction of the Industrial Court to hear and determine the case on the merits: see s. 29(d) of Act 177. The Industrial Court derives its jurisdiction from the order of reference by the minister made under s. 20(3) of Act 177 and which such court must exercise, so it was held in *Assunta Hospital v. Dr A Dutt* [1981] 1 MLJ 115 FC.

In the premises I am satisfied that the Industrial Court committed no error of law affecting its jurisdiction in deciding in its ruling that it had jurisdiction to hear and determine Industrial Court Case No. 4/4-336/89 and for the reasons given, I am of the view which I so hold that the applicant had not shown a *prima facie* case or an arguable case for leave to issue *certiorari*. Consequently, I refuse the leave application. Order accordingly.